United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

74-1793

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1793

RACHAEL EVANS, *et al.*,
Plaintiffs-Appellants,

—v.—

JAMES T. LYNN, *et al.*,
Defendants-Appellees,

—v.—

THE TOWN OF NEW CASTLE,
Appellee-Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FEDERAL-APPELLEE'S PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for Federal Defendants-Appellees.

V. PAMELA DAVIS,
STEVEN J. GLASSMAN,
Assistant United States Attorneys, Of Counsel.

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FEDERAL-APPELLEE'S PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

Statement

The federal appellees James T. Lynn, as Secretary of the Department of Housing and Urban Development (HUD); Joseph D. Monticoiolo, Acting Area Director of HUD (New York); S. William Green, Regional Administrator of HUD; HUD; Rogers C. B. Morton, as Secretary of the Department of the Interior (Interior); James A. Watt, as Director of the Bureau of Outdoor Recreation (BOR) of Interior; and Interior (hereinafter the "federal appellees"), hereby suggest pursuant to Rule 35, F.R.App.P., the appropriateness of a rehearing *en banc* following the decision of a panel of this Court dated June 2, 1975. This Court's opinion

reversed the decision of the District Court (Pollack, *J.*) that appellants did not have standing to sue the federal appellees. The Court affirmed as to appellee Tri-State Regional Planning Commission and its Director.

The federal appellees suggest that a rehearing is appropriate because of 1) the conflicts among the three opinions and 2) the conflict of the result with decisions of the Supreme Court, most recently stated in *Warth* v. *Seldin*, — U.S. —, 43 U.S.L.W. 4906 (June 25, 1975).

ARGUMENT

The June 2 decision holds that minority residents of a particular community have standing to attack the granting of federal funds to another community (the Town of New Castle) with allegedly restrictive zoning practices although (1) they do not live, (2) they have never attempted to live, and (3) they have no plans to live in New Castle, on the claim that such grants permit the maintenance of a growing pattern of racial residential segregation. The plaintiffs make no showing that the granting of the relief sought in the complaint would in any way alter the circumstances which led the June 2 panel of this Court to find that they were injured. It is suggested that the decision is directly contrary to recent Supreme Court decisions in *Warth* v. *Seldin*, — U.S. —, 43 U.S.L.W. 4906 (June 25, 1975); *United States* v. *Richardson*, 418 U.S. 166 (1974) and *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), as well as *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973) and *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), all of which emphasize the need for concrete "injury in fact" to maintain standing to sue.

A rehearing *en banc* is merited here both to secure uniformity within the Second Circuit and because of the importance of the standing issue presented by this case, thus satisfying the requirements of Rule 35, F.R.App.P.

The decision herein involved three separate opinions. Rather than repeat our full argument here, we note that the federal appellees rely on the correctness of their brief dated August 13, 1974, and the dissenting opinion of Judge Moore herein.

We emphasize that no two judges on the original panel agreed on either the basis for standing or the relief to which plaintiffs may be entitled. Thus, Judge Oakes finds a non-particularized injury to be sufficient for standing where one challenges administrative violations of statutory duties under Title VIII of the Fair Housing Act, akin to a private attorney-general suit, and seeks injunctive relief restraining the grant of federal funds. Slip op. at 3897-99. Judge Gurfein would hold that there is standing under the Administrative Procedure Act, 5 U.S.C. 702, to raise the question of whether HUD failed to make inquiries implied from Title VIII duties. Slip op. at 3917-18. Further, Judge Gurfein agreed with Judge Moore that the complaint should be dismissed against defendant Tri-State Regional Planning Commission for lack of standing. In discussing "injury in fact",* Judge Oakes concedes that if this action were solely against the Town of New Castle, standing would be precluded by the Second Circuit's opinion in *Warth* v. *Seldin*, 495 F.2d 1187 (2d Cir. 1974), Slip op. at 3897. And thus, while finding no more concrete injury is required where there is a statute (Title VIII) on which the suit is based, Judge Oakes' position would allow plaintiffs to attack indirectly what they could not under *Warth* attack directly.

Judge Oakes goes on to distinguish *Schlesinger* and *O'Shea* on the unusual basis that in those cases:

> "standing was denied to plaintiffs bringing constitutional challenges to statutes since they contain an

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* The Government had conceded that plaintiffs were within the zone of interests of Title VIII, and we do not seek review of Judge Oakes' opinion in this regard.

> underlying, if not articulated, minor premise that Congress cannot enact a statute conferring standing to bring a constitutional challenge. See Monaghan, *Constitutional Adjudication*: The Who and When, 82 Yale L. J. 1363, 1380-83 (1973). But where Congress has created a duty, Congress can declare that anyone aggrieved can enforce the corollary right." Slip op. at 3899.

This attempt to distinguish the controlling Supreme Court cases must, we believe, fail. Those cases reaffirm the requirement of concrete injury in fact as set forth in *Sierra Club*, which arose under the Administrative Procedure Act. Further, *O'Shea* v. *Littleton, supra,* specifically holds that the principle as to concrete injury is the same where statutory issues are raised. 414 U.S. at 493 n.2, 494.

More importantly, Judge Oakes failed to consider the aspect of injury in fact which was emphasized by the Supreme Court in its affirmance of *Warth* v. *Seldin, supra,* i.e., the requirement of Article III of the Constitution that the relief sought would remove or in some way alleviate the harm which constitutes the injury. Plaintiffs herein have made no showing, could make no showing, that the review of the Title VIII enforcement policies of the defendant agencies or even the enjoining of the two grants would in any way alleviate the housing problems which they encounter. Rather, Justice Powell could have been describing plaintiffs herein when he wrote of petitioners in *Warth* v. *Seldin, supra* at 4910:

> "Indeed, petitioner's description of their individual financial situations and housing needs suggest precisely the contrary [of the proposition that they would be benefited by the relief sought]—that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts."

The attempt in the "majority" opinion to analogize this case to *United States* v. *SCRAP,* 412 U.S. 669 (1973) must also fail. As Judge Moore noted, slip. op. at 3912, 3915, *SCRAP* was an environmental case and has been subsequently restricted by the Supreme Court.

Although Judge Oakes does *not* find standing "on the basis that [plaintiffs] have a sufficient connection with the community to or for the benefit of which the grants are made" he finds standing because the grants here "made to a [*sic*] urban community, or one that is satellite to a metropolitan area of which appellants are residents" are related to housing or urban development. Slip op. at 3899-3900. If the lack of a sufficient connection between plaintiffs and New Castle were irrelevant, then this decision would allow plaintiffs to attack a HUD or BOR grant anywhere in the country, a result clearly antagonistic to any sense of "case or controversy." On the other hand, if standing depends on the physical proximity of plaintiffs to the grantee town, then the case should be controlled by Judge Oakes' own finding of lack of sufficient "connection," and the Second Circuit's reasoning in *Warth,* recently affirmed by the Supreme Court.

Judge Gurfein similarly states: "Although the question is close, minority people *fairly near the geographical area* involved may be deemed 'aggrieved' by the agency inaction." Slip op. at 3918-19. (Emphasis added.) We contend that the injury in fact requirement in order to be "aggrieved" is no different under the Administrative Procedure Act than under the more general standing situation. See *Sierra Club, supra.* Consequently, the reasoning in *Warth* should be persuasive regardless of the jurisdictional basis for the action or the statute involved.

Judge Gurfein's opinion raises several other questions which the Government suggests are appropriate for a rehearing *en banc*. He states:

> "In cases raising issues of discrimination, as well as environmental considerations, all that conferring standing under the Administrative Procedure Act does is to let an Article III case or controversy be heard within the sharp adversity required." Slip op. at 3919.

First, such a holding would reverse the process dictated by the Supreme Court for determining standing. The cases from *Baker* v. *Carr*, 369 U.S. 186 (1969) to *Schlesinger* all hold that if one has sufficient adversity, there will then be standing, and not that the conferring of standing results in sufficient adversity. Further, we find no precedent for holding that standing should be so liberally construed in the civil rights area. We see no basis for so eroding the Supreme Court's position on standing, and indeed the Second Circuit's decision in *Warth*, involving restrictive zoning, is contrary to this position.

Judge Gurfein would deny standing as against defendant Tri-State Regional Planning Commission, on the following basis:

> "To allow every denial of area significance to be reviewed by the courts, particularly at the instance of persons as remote from area considerations as these plaintiffs, would simply invite a plethora of suits with a grave question of the ultimate judicial competence to solve them. Whether a sewer pipe in a town is a concern of a large area need not be litigated in the context of racial discrimination." Slip op. at 3920.

We agree with this analysis, but feel that the same analysis must result in a lack of standing as to the federal defendants.

It is suggested that the criteria for an *en banc* rehearing are all met in this case. In dissenting from a denial of an *en banc* suggestion in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1020, 1021-26 (2d Cir. 1973) Judge Oakes listed the following factors: (1) the case is extremely important and vitally affects class actions (particularly civil rights actions here) affecting large numbers of citizens; (2) the panel reaches a doubtful result; (3) the Supreme Court has urged that the *en banc* procedure be used; (4) there are no compelling reasons for not hearing the case *en banc*. The judges who voted against *en banc* reconsideration in *Eisen* did so because of their confidence that the Supreme Court would grant certiorari, see 479 F.2d at 1020-21, a factor which is not as clear here given the plethora of Supreme Court cases on standing already considered in recent years which would appear to have determined the issues on this case and the extensive discussion of standing in the recent *Warth* decision.

Because of the importance of the decision, the doubtful result of the three opinions, the lack of clarity as to basis of standing or scope of relief herein, and the conflicting law in the Circuit as affirmed by the Supreme Court in *Warth*, we urge that the Court approve the suggestion of a rehearing *en banc*.

Dated: New York, New York
July 7, 1975

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for Federal Defendants-Appellees.

V. PAMELA DAVIS,
STEVEN J. GLASSMAN,
Assistant United States Attorneys,
Of Counsel

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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

74-1793

Lillian Dickson being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2 day of July 1975 he served a copy of the within 2 copies

PETITION

by placing the same in a properly postpaid franked envelope addressed: ① Richard Bellman 351 Broadway New York N.Y. ② Golenbock & Barell 645 5th Ave. New York, N.Y. ③ Wikler Gottlieb et al. 40 Wall St. New York N.Y.

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Lillian Dickson

Sworn to before me this
2 day of July 1975

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1977